MFA 4/2001
BEFORE
HON'BLE MRS. JUSTICE ANIMA HAZARIKA
JUDGMENT & ORDER (ORAL)

This appeal under Section 30 of the Workmen's Compensation Act, 1923 ('WC Act' f or short) has been filed by the Oriental Insurance Company Ltd. Challenging the award dated 27.11.2000 passed by the learned Commissioner Workmen's Compensation , Kokrajhar in WC Case No.1/2000. By this impugned judgment, learned Commissione r has awarded Rs.1,68,239 (Rupees one lakh, sixty eight thousand, two hundred a nd thirty nine) only in favour of the claimants directing the amount to be paid by the opposite party No.2, i.e. Oriental Insurance Company Ltd, Bongaigaon Divi sion, Bongaigaon.

2. Heard Mr. S Dutta, learned counsel appearing for the appellant. None app eared for the respondents despite service of notice.

3. The case of the claimant, respondent No.1 is that he was a handyman of v ehicle (Mini Bus) No.AS-16/2652. On 16.4.2000, while the aforesaid Mini Bus was proceeding from Bongaigaon towards Kokrajhar, the said vehicle met with an accid ent at village Gondergaon near Kashikotra under Sidli Police Station resulting grievous injury on the person of the claimant including fracture on the right hand. Accordingly, the claimant filed the case before the learned Commissioner, Workmen's Compensation, Kokrajhar, claiming compensation for his injuries sustai ned in the Motor Vehicular accident. The owner of the vehicle filed written stat ement admitting the fact that the injured was working as handyman in his vehicle and he sustained injury in the course of his employment. Further, contending th at the respondent No.2, i.e. the owner of the vehicle paid Rs.1500/- to the clai mant per month (PM) as his wages including other allowances.

4. The appellant, Insurance Company filed written statement and has denied its liabilities. The respondent No.1 claimant adduced evidence stating that he w as earning Rs.1800/- per month though, the owner of the vehicle, in his written statement stated that he used to pay Rs.1500/- PM to the claimant.

5. The learned Commissioner after hearing the parties and upon perusal of t he relevant record of the case, awarded a sum of Rs.1,57,233/- alongwith Rs.11,0 60/- as interest for 7 (seven) months to be paid to the claimant.

6. The appeal has been admitted on the following substantial questions of l aw:

Whether compensation under the Workmen's Compensation Act may be determined/ass essed without any medical evidence on record.

7. According to the counsel for the appellant, the learned Commissioner is duty bound to examine the concerned doctor to ascertain the nature of disability and also to find out percentage of loss of earning capacity. However, this was not done by the learned Commissioner and the learned Commissioner has assessed t he disability on the basis of the certificate issued by the Medical Officer. In support of his submission, learned counsel has referred to the decision rendered by this Court in case of M/s New India Insurance Co. Ltd. -vs- Sanjit Kumar and Ors. reported in 2000 (2) GLT 567.

8. The second limb of argument of the learned counsel for the appellant is that the learned Commissioner passed the award holding the loss of earning capac ity of the claimant to the extent of 70% only on the basis of the medical certif icate which was not legally proved and more so, the certificate did not disclose anything regarding the extent of the disability, inasmuch as, the evidence of p hysical disability to the extent of loss of earning capacity has to be proved by adducing specific evidence of the Doctor. The learned Commissioner has erred in

law in assessing the earning capacity of the claimant to the extent of 70% by h imself without making any assessment of loss of earning capacity of the claimant by any qualified medical practitioner as required under Clause(II) of sub-Secti on (1) (c) of Section 4 of Workmen's Compensation Act whereas the specific requi rements of the provision of Section 4(b)(c) explanation (ii) for non schedule i njury is that loss of earning capacity is to be assessed by the qualified medi cal practitioner to which the learned Commissioner has given total go-bye.

9. Third limb of argument of the learned counsel for the appellant is that despite the statements made by respondent No.2, i.e. the owner of the vehicle in his written statement that he used to pay Rs.1500/- per month as wages and allo wances, learned Commissioner accepted the monthly income at Rs.1800/- simply on the basis of the statement made by the respondent No.1 before the court without any documentary proof to that effect.

10. Hence submitted Mr. Dutta that on the above grounds alone, the award so passed by the learned Commissioner is required to be suitably modified as per la w.

11. I have perused the award dated 27.11.2000 and also gone through the prov isions of law. It is a settled position of law that examination of the doctor i s necessary to determine the percentage of loss of earning capacity and though I am satisfied with the arguments advanced by Mr.Dutta that learned Commissioner without examining the doctor ought not to have passed the award only on the basi s of the certificate issued by the doctor holding the disability to the extent o f 70%, but considering the fact that the award was passed on 27.11.2000 i.e. abo ut 11 years ago, I am not inclined to remand the matter back to the learned Comm issioner for fresh disposal as argued.

12. However, on the second ground i.e. passing of the award, taking into co nsideration the monthly wages and allowances at Rs.1800/-, in my considered opin ion was not proper. The learned Commissioner ought not to have passed the award, considering the wages and allowances at Rs.1800/-, inasmuch as, the respondent No.2, i.e. the owner of the vehicle has stated in the written statement filed by him that he used to pay Rs.1500/-PM to the claimant. In that view of the matter passing the award on the basis of wages and allowances at Rs.1800/- per month w ithout any documentary proof to that effect, in my considered opinion, was not p roper on the part of the Commissioner. Hence the award is modified to the extent that instead of computing the award taking the monthly wages at Rs.1800/-, it w ould now be computed taking the monthly wages at
Rs.1,500/-

13. Taking the wages and allowances at Rs.1500/- per month, compensation amo unt would be-

(i) 60% of the total monthly wages Rs.1500/- = Rs.900.00
(ii) Factor for age of 30 years = Rs.207.98
(iii) Total loss of percentage of the earning capacity = 70%

Due compensation = Rs.900 x 207.98 x 70%
= Rs.900 x 207.98 x 70
100
= Rs.1,31,027.40

14. Now, the appellant Insurance Company would be liable to pay the remainin g amount to the claimant after deducting the aforesaid amount (i.e.50% of the aw arded amount). After modification of the order the learned Commissioner shall ca lculate the amount to be paid to the claimant. The appellant Insurance Company w ould file an application before Commissioner, Workmen's Compensation, Kokrajhar

for final determination of the awarded amount to be paid. After the disbursement of the amount, if any excess amount remains, the learned Commissioner shall refund the same to the Insurance Company.

15. With the aforesaid modification the appeal stands disposed of.

16. Registry is directed to send down the lower court record.